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No. 318.

Office - Supreme Court, U. S.
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In the Supreme Court of the United States

October Term.

LOUISE McGREW MOFFETT and LOUISE McGREW MOFFETT as Executrix of the Estate of Thomas S. Moffett, Deceased, *Appellants,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, B. C. HOWARD and WILLIAM H. KOPP, *Appellees.*

RESPONSE TO "MOTION OF APPELLEES TO STRIKE ALL OR CERTAIN PARTS OF APPELLANTS' DESIGNATION OF POINTS ON WHICH THEY INTEND TO RELY"

and

APPELLANTS' REQUEST FOR A FULL HEARING ON THE MERITS.

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Said motion is evidently directed to appellants' Statement of Points.

Appellees seem to be so obsessed with the alleged principle of Misjoinder that they contend that it applies to Mrs. Moffett in both capacities, and that it also applies to the papers filed by her for use in more than one capacity. In other words, appellees are relying upon the alleged and novel principle of *misjoinder of papers*. That is, they contend that the assignment of errors, which appellants have adopted as part of their points to be relied on, cannot perform more than one function. And this singular contention is thus made, although adoption of the assignment of errors as a statement of points to be relied upon is a practice long recognized by this Court as appropriate. Robertson and Kirkham, in their Jurisdiction of the Supreme Court of the United States, Section 364, page 752, say:

> "Where counsel are satisfied with the assignment of errors, it is a common practice to file a statement adopting the assignment of errors as the statement of points required by Rule 13."

This Court in *Flournoy* v. *Wiener*, 321 U. S. 253, and *Herb* v. *Pitcairn*, 324 U. S. 117, cite Robertson and Kirkham on Jurisdiction as authority.

Appellees attempt to eliminate appellants' statement of points by referring to them as assignments of error and contending that Points I and II, supplementing the assignment of errors, should have been filed in the Supreme Court of Missouri. Points I and II are not additional assignments of error and there is no rule requiring the statement of points to be relied upon to be filed in the lower court. On the contrary, said rule requires that the statement of points be filed with the clerk of this Court, as they were.

Appellees' real complaint is that appellants did not file two papers instead of one, setting forth the same points.

Appellants' statement of points was made in the spirit of the rules of this Court requiring brief statements and limitation of repetition. It is respectfully suggested that the appellate jurisdiction which the Constitution requires this Court to exercise should not be defeated on any such tenuous ground.

Appellees profess not to waive or abandon their motion to dismiss or affirm or to prejudice the hearing and disposal thereof by their motion to strike. But, nevertheless, they have urged that this Court has no jurisdiction to do anything in this case but to dismiss it. And yet they invoke the jurisdiction they say does not exist in this case to strike what they erroneously describe as the "designation of points on which they (appellants) intend to rely"!

Appellants strictly complied with the provision of paragraph 9 of Rule 13 by filing a Statement of the points on which appellants intend to rely, and not a "designation" thereof as appellees assert.

The claims in the motion and especially the following:

> "2. That part of said designation entitled 'Assignment of Errors' (subdivided as parts I and II) should be stricken for the reason that said assignments were not filed with the clerk of the Supreme Court of Missouri at the time of filing of and accompanying appellants' petition for appeal as required by rule 9 of this Court, but such designation constitutes an attempt to add additional assignments of error after the time provided by said rule and in violation thereof."

are occasioned by appellees' attempt to eliminate from consideration the opening sentence:

> "Come appellants in the above entitled cause and adopt their Assignment of Errors in this Court, sup-

plemented by the following numbered Points I and II, as their statement of points to be relied upon; * * *"

A similar act of a party in omitting a part of a sentence offered in evidence and refusing to read all of it, was thus condemned in *Bompart* v. *Lucas,* 32 Mo. 123, l. c. 124:

> "At the trial of this case, the plaintiff offered in evidence a portion of a sentence of the answer of Lucas in the previous case, and refused to read the remainder of the sentence which materially qualified the effect of the portion read, and the court refused to compel him to read the remainder. This was manifestly wrong; and is only equalled by the case of the infidel who undertook to prove from the Scriptures the want of a deity by reading the words 'there is no God,' and omitting the preceding words, 'the fool hath said in his heart'."

From the physical fact that appellees have devoted 100 pages to debating the questions raised by the assignment of errors in their suggestions opposing jurisdiction, and extraneous questions, and in which they have discussed all of said assignments excepting Nos. 17, 19, 21, 23, 24 and 30, it would seem that appellees are asking this Court to do that which it has itself decided it is without jurisdiction to do.

Appellees set out the numbers of the assignments (now adopted as a part of appellants' statement of points) they discuss on the following pages of the certified transcript of the record:

Transcript Pages	Assignments of Error (Points)
956 to 967	14, 15, 18
968 to 974	20, 33, 34
975 to 979	16
980 to 988	22
989 to 994	37
1010 to 1015	1 to 13 and 25, 27, 28, 29, 32, 35 and 36
1020 to 1028	1
1033 to 1036	26
1037 to 1039	10, 11, 12, 13, 18, 26 and 31

The assignments excepted from discussion are more definite and certain than those they have discussed, but they can offer nothing to palliate the errors there specified.

It would seem that if the assignment of errors were sufficiently certain and definite to provoke 100 pages of discussion from appellees on the merits thereof in their said suggestions, they cannot very well, with good faith, claim that they are not sufficiently definite to enable them to do that which they have done at such length and futility, or that they are not sufficiently definite to enable appellees to discuss same in their brief when adopted as part of appellants' "statement of points to be relied upon."

Appellees' position is that they can discuss them as assignments of error but cannot discuss them as points!

Appellees seem to think that, whether or not this Court has jurisdiction on appeal depends on its discretion and not upon the Constitution and law. But throughout the years this Court has ruled to the contrary. In *Cohens* v. *Virginia*, 6 Wheat, it is said, l. c. 404:

> "It is most true that this court will not take jurisdiction when it should not; but it is equally true that it must take jurisdiction if it should."

That principle, as applied to this case, is reiterated in *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, where it is said, l. c. 651:

> "The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled."

These decisions recognize the obligatory effect of the constitutional provision, as it applies to this case, in Section 2 of Article III, providing that

> "In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

As this case involves the validity of federal and state statutes in the way specified in Section 237, Judicial Code, the obligatory appellate jurisdiction conferred by the Constitution, as it applies to this case, has never been changed. Sec. 237, Judicial Code, provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

For the words "writ of error" the Congress in 1928 substituted the word *appeal*.

The jurisdictional statement and the record disclose that the validity of Sections 1979, 1980 and 1981, U. S. R. S., was drawn in question by the demurrers of the appellees, and that the judgment of the State Supreme Court holding that appellant's pleading disclosed that she was not denied due process and hence failed to state a cause of action was a decision holding said acts of Congress invalid under the rule applied in *United States* v. *Sutton*, 215 U. S. 291.

It is also shown by the record that the validity of statutes of Missouri, on the ground of their being repugnant to the Constitution, a treaty and laws of the United States was drawn in question, and that the state court's decision was in favor of the validity of said statutes. And especially does this appear from the passage of the opinion of the State Supreme Court wherein it explicitly stated that appellants questioned the validity of Section 948, R. S. Mo. 1939, on the ground of conflict with the Constitution, and the opinion discloses that the State Supreme Court expressly held that said statute was not repugnant to the Constitution and that it was valid (826). Thus:

> "Appellants say that Section 948 * * * violates Article 1, Section 10, of the Federal Constitution, which prohibits a state from passing a bill of attainder. * * * It does not resemble a 'bill of attainder' or of 'pains and penalties.' * * * It applies only to civil procedure, inflicts no penalty without a hearing, authorizes neither fine nor imprisonment, but only a money judgment for unreasonably consuming the time of courts and litigants and causing needless expense by filing defective petitions."

The fact and the law that

> "The power, * * * to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, *does not apply to cases where the subject matter of the controversy is per se and inherently Federal.*" (*Equitable Life Ass'n Soc.* v. *Brown*, 187 U. S. 308, l. c. 311, citing *Swafford* v. *Templeton*, 185 U. S. 487, 493),

has caused appellees to abandon their claim that this Court has no jurisdiction of this case. And they now resort to a belated complaint of the "Assignment of Errors" and the "Statement of Points," and urge that they are so vague and indefinite that they cannot understand them and therefore cannot possibly engage in a debate with reference thereto. But said contention is contradicted by the physical fact that appellees have devoted the greater portion of their 100-page debate entitled, "Suggestions Opposing Jurisdiction," to the solemn debate of said "Assignments of Error," and under the time-honored "physical fact" rule establishes the invalidity of said contention.

Even if this Court could apply the test applicable to a case which could be dismissed for the want of a substantial federal question to appellees' latest belated complaint, that test would necessitate the denial of their motion to strike. That test is that unless this Court is able

> "to say that every question that appellants have brought here for decision *is so clearly not debatable* and utterly lacking in merit as to require dismissal for want of substance" (*Hamilton* v. *University of California*, 293 U. S. 245, l. c. 258)

the motion cannot be sustained. But appellees' extensive debate of said assignments destroys their contention that

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is is impossible for them to debate that which they have so laboriously and extensively debated. Their futile debate merely establishes appellants' right to have this Court exercise its jurisdiction and reverse the judgment of the Missouri Supreme Court.

The foregoing demonstrates that the motion to dismiss or affirm cannot be sustained. For, having jurisdiction, the Court cannot decide the issues without a full hearing on the merits, especially when such hearing is requested.

Appellees' response to the citation informs this Court that if it determine that it has jurisdiction

> "• • • appellees desire to file briefs and to be heard before the Court at the times and in the manner provided by the rules of the Court."

The above is equivalent to a demand by appellees of their constitutional right to file briefs and to be heard before the Court, if it determines that it has jurisdiction.

The jurisdiction of the state court on appeal from the judgment rendered after sustaining demurrers is pointed out in *Graves* v. *Graves*, 255 Mo. 468, l. c. 480, as follows:

> "We can only consider the allegations of the petition and the demurrer."

That court could not consider the opinions and exhibits attached to their suggestions opposing jurisdiction (1050-1062). In *Graves* v. *Graves* the Missouri Supreme Court, in refusing to consider questions not appearing from the petition and the demurrer, said, l. c. 479:

> "This matter cannot be considered here. This case stands here upon a demurrer to the plaintiff's petition. • • • We must adhere to the allegations of the petition here. If it states facts for relief, we must

sustain it, although outside of the record before us there may be other facts detrimental to plaintiff's cause of action. These matters might be raised by answer, but not by general demurrer."

In *Stewart* v. *Masterson,* 131 U. S. 151, this Court said, l. c. 158:

> "It is very clear that the present demurrer introduces as its support new facts which do not appear on the face of the bill, and which must be set up by plea or answer."

In *Pacific R. R. of Mo.* v. *Mo. Pacific R. Co.,* 111 U. S. 505, at l. c. 518, this Court said:

> "We are of opinion that this court cannot consider anything which is not contained in the bill and the exhibits which are annexed to it, and that it cannot look into anything otherwise presented as the files and records of the Ketchum suit, or of any other proceedings in any court, for the purpose of determining the questions arising on the demurrers to this bill."

Opinions by courts of other jurisdictions cannot be considered by the Missouri courts under the state of the record. (*Friedman* v. *Maryland Casualty Co.,* 228 Mo. App. 680.)

Neither could the Missouri court, by virtue of the device known as judicial notice, referred to in their suggestions (1010-1015), consider said opinions under the law as declared in *State ex rel. Eastin,* 270 Mo. 193, l. c. 210:

> "We take notice of a former appeal and of the record thereof (*Keaton* v. *Jorndt,* 259 Mo. 179); but we do not notice the facts and records in one action when called on to rule another and separate one

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(*Spurlock* v. *Railroad*, 76 Mo. 67; *Banks* v. *Burman*, 61 Mo. 76; 16 Cyc. 918)."

The Missouri court has recently ruled in *Knorp* v. *Thompson*, 352 Mo. 44, l. c. 52:

> "It is not just that a court should, in deciding the issues of a case, consider evidence introduced in another and different case, and thus decide a case upon the evidence which a party had been afforded no opportunity to refute."

On this appeal this Court will review all federal questions decided by the state court, or which it was its duty to decide, and exclude from consideration all questions not raised by the appellants' petition and appellees' demurrers—excepting, of course, such federal questions as those referred to in assignments or points 2 and 37, which questions were brought into the record by the state court's unanticipated denials of the equal protection clause of the XIVth Amendment at a time when the record could not be added to, under the principle stated in *Shaw* v. *Saunders*, 244 U. S. 317, l. c. 320; *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673; *Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313.

Of course, under the Vth Amendment this Court, when a litigant demands a hearing to which he has a constitutional right, cannot render a valid judgment or decision without a hearing on the merits in any case wherein it has jurisdiction, in accordance with the principles stated in *Ex parte Nelson*, 251 Mo. 63, l. c. 103:

> "'He that answereth a matter before he heareth it, it is folly and shame unto him. (Proverbs, 18:13.)'"

Windsor v. *McVeigh*, 93 U. S. 274.

Hovey v. *Elliott*, 167 U. S. 409.
Protector and the Town of Colchester, Style 447 (1655); 82 English Repr. 850.

White, The Law in the Scriptures, Section 346, says:

> "• • • any system of law that would sentence an accused, without a hearing, would deny to him 'due process of law,' as guaranteed under the Constitution of the United States (Fifth Amendment, construed in *Mitchell* v. *Clark*, 110 U. S. 633), and also by the law of Moses. (Num. 35:30.)"

Accused, as appellees are, and guilty as they admit they are, we believe that they are right in their contention that this Court, under its own decisions and the Vth Amendment, will accord them an oral hearing and permit them to file briefs on the merits. Otherwise, its judgment would be without due process of law.

Rule 28 recognizes that they are entitled to an oral hearing, and we agree with them on that one point only. Appellants ask only the same right or privilege to a hearing on the merits, as guaranteed by the Fifth Amendment, the law and the rules of this Court. Said rules are the law of the court (*Rio Grande Irrigation & C. Co.* v. *Gildersleeve*, 174 U. S. 603, l. c. 608-609).

Appellants respectfully submit that by reason of the foregoing, all of appellees' motions should be overruled.

And since this Court unquestionably has jurisdiction, appellants now here invoke the protection of the Vth Amendment to the Constitution of the United States guaranteeing due process of law, and ask that they be permitted to present said cause on its full merits to the Court by means of briefs and oral arguments, as provided under the rules of this Court.

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RESPONSE TO APPELLEES' SUGGESTIONS.

Appellees' last suggestions reintroduce "Appellees' Suggestions Opposing Jurisdiction," on page 6 thereof. Appellees claim that the motion to strike and the suggestions in support thereof, in connection with appellees' suggestions opposing jurisdiction, justify their latest suggestions—not merely in support of the motion to strike, but also in support of the motion praying "the dismissal of the appeal" (page 7).

Appellees' discussion of appellants' very first assignment of error in their said suggestions opposing jurisdiction (934) is an illustration of the lack of merit of their complaint as to appellants' assignment of errors and statement of points. Their Point IX (1020) begins:

> "In Appellants' First Assignment of Error (see also page 5, Appellants' Jurisdictional Statement) it is claimed that the Supreme Court of Missouri, 193 S. W. (2d) 588, denied appellants their constitutional rights by holding that 'the petition did not state a cause of action.'
>
> The opinion itself shows the contrary."

Said assignment of error 1 seems to be sufficiently definite in stating that the trial court erred in deciding that appellants' pleading "did not state a cause of action."

We direct this Court's attention to the following from the opinion itself, which establishes that the opinion is not contrary to said "First Assignment of Error."

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The opinion says (827):

"Appellants have not been denied due process,"

notwithstanding appellees admit the allegations of the petition specifically disclosing that Mrs. Moffett was not accorded due process in the Kansas litigation by the Kansas district judge, nor by the Missouri courts under color of state laws, in denying Mrs. Moffett's attempt to be relieved from the pendency of the fictitious suits for $2,539,366.80 (268) for sixteen years.

The opinion continues (827):

"They have not only had their day in court, but their months and years,"

thus and thereby deciding that the only question in the case which constitutes the federal basis of the cause of action does not exist and hence that the pleading does not state a cause of action. This operates to make appellees' contention that the Supreme Court of Missouri did not decide that the petition did not state a cause of action, and did not decide any federal questions except one, a wholly baseless contention.

Does not said sardonic language in the opinion of itself decide that appellants' petition (154-323) does not state a cause of action?

Said decision, that appellant was not denied her federal rights under the due process and equal protection clauses of the XIVth Amendment, is supplemented by the following categorical statements in the opinion, disclosing that the opinion contradicts appellees' contention and specifically decides that appellants' pleading does not state a cause of action.

1. The opinion points out (824) that the amendment " * * * in no way affected the point made in the

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demurrers as to misjoinder of parties plaintiff or failure to state a cause of action."

2. In discussing the pleadings the opinion says (825):

> "The pleadings ruled upon by Judge Ridge were demurrers, nothing more. They may have contained repetition and surplusage, but the complaint as to defect of parties and failure to state a cause of action were clearly stated. Such could be determined from the face of the petition."

3. The opinion points out (821) that in a former case the court ruled:

> "* * * that 'misjoinder of parties,' although not listed in the statute, is a ground of demurrer because in that situation the petition does not state a cause of action,"

and then applied said alleged rule.

4. The opinion (827) calls attention to the assignments of error raising federal questions and says:

> "None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiff or fails to state a joint cause of action."

Appellees admit that no case justifies their motion. They, however, cite one case (291 U. S. 293) wherein this Court found that the errors could have been stated in five points, whereas there were 250 assignments of error. Another case (238 U. S. 507) contained eighteen pages of assignments of error which dealt with one single transaction.

In contrast, this case involves many overt acts by ap-

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pellees and other conspirators in three states, between the year 1921 and this date.

And, in addition, there are federal questions in greater number raised in this case than in any case cited by appellees.

Appellants will brief all the questions raised in their statement of points.

Appellees also cite a court of appeals case (142 Fed. (2d) 141) which refers to failure to include numbered specifications of error in the appellants' brief.

The fact that appellees refer to such authorities of itself discloses that no authority sustains their contention and that the authorities as a whole destroy their contentions.

The Civil Rights Statutes (R. S. U. S., 1979, 1980 and 1981), supplementing the Constitution, authorized Mrs. Moffett to bring the action in the state court in every capacity in which she had sustained injury. In disobeying the rules of construction made obligatory upon the state court by R. S. U. S. 1 (Section 1, Title 1, U. S. C.) and by Section 652, R. S. Mo. 1939, the state court erred in failing to construe said Civil Rights Statutes as required by said construction statutes and erred in dismissing Mrs. Moffett's action on the ground of misjoinder of parties plaintiff, and thus and thereby denied appellants the rights, privileges and immunities secured by the provisions of the Constitution, laws and treaty referred to in the record herein.

Picking et al. v. *Pennsylvania R. Co. et al.*, 151 Fed. (2d) 240.
Bell et al. v. *Hood et al.*, 90 Law Ed. 758.
Georgia v. *Pennsylvania R. Co.*, 324 U. S. 439.

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The opinion of the Supreme Court of Missouri, by its statement that (820):

> "Appellants claim error under twenty-two numbered assignments, some being merely a repetition of others. We have considered all of these assignments, but see no useful purpose in discussing each one separately."

And by the further statement (829):

> "None of these assignments is germane to the question of whether the fifth amended petition contains a misjoinder of parties plaintiff or fails to state a joint cause of action,"

establishes the fact that the State Supreme Court considered all the federal questions and, in stating that they were not "germane" to the question of misjoinder of parties plaintiff or failure to state a joint cause of action, considered and decided each and all of the federal questions in the case against appellants. The question as to whether or not they were "germane" to the question which the state court decided is, of itself, a federal question to be decided by this Court. *Lovell* v. *Griffin*, 303 U. S., l. c. 450. The Supreme Court of Missouri was powerless, by said statement, to deprive this Court of jurisdiction to decide the federal questions raised in the case.

The Supreme Court of Missouri could not properly decide whether some assignments were "germane" to other assignments without considering both and rendering a decision based on both. And that court long ago applied the applicable principle to a similar question, to-wit: whether evidence was sufficient or insufficient to justify a judgment. In *State* v. *Cushenberry*, 157 Mo. 168, Judge Sher-

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wood italicized his own language with reference to such question as follows, l. c. 182:

> *"Whenever the sufficiency of the evidence is considered, necessarily you must consider its insufficiency; the two are inseparable in thought."*

Appellees' motion to strike is not really directed to appellants' "statement" of points. It is directed to an imaginary "designation" of points. And so the motion to strike is without any subject matter upon which to operate.

Applying the technical principles by which appellees regulate their conduct in every court, then for said reason, as well as for all the others, the motion to strike should be denied.

Barr v. *United States*, 324 U. S. 83, discusses the question whether dual or multiple exchange "rates" were in contemplation when an act of Congress was passed and held, l. c. 90, that though the statute was in the singular, yet

> "But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislatures."

And so, in the Civil Rights Acts, the Congress has made choice of language which fairly brings the situation now before the Court within Section 43 and the other sections of Title 8, U. S. C. A. And this for the reason that Mrs. Moffett, on the record before this Court, is a single entity or person who has sustained loss in two capacities and the same facts and law constitute the basis of her rights in both.

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But this Court goes farther in the Barr case and also applies Section 1, U. S. C. A., to the construction of the statute, using the following language, l. c. 91:

> "It is true that Section 522 (c) speaks only of the 'buying rate.' And that use of the singular rather than the plural is stressed by respondent. We may note, however, in passing that Section 1 of the Revised Statutes, 1 U. S. C. A., Sec. 1, 2 F. C. A., Title 1, Sec. 1, provides that 'words importing the singular number may extend and be applied to several persons or things.'"

Appellants' statement of points includes the point that the state court, in applying the nonexisting state rule of practice as to misjoinder of parties plaintiff, altered Mrs. Moffett's rights as those rights were established in the federal law on which Mrs. Moffett based her action and whether the state court declined to enforce the remedy given to Mrs. Moffett by the federal law. Hence, said statement of points is sufficient because it enables this Court to consider and decide the question as to whether the state court's application of the alleged state rule of practice denied Mrs. Moffett the rights which the federal law protects.

In *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, it is said, l. c. 245-246:

> "If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less but more secure. The constant objective of legislation and jurisprudence is to assure litigants

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> full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. * * * So here, in trying this case, the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under Section 237 (b) of the Judicial Code, 28 U. S. C. A., Section 344 (b)."

See, also, *Standard Oil Company* v. *Johnson*, 316 U. S. 481, which says, l. c. 482-483:

> "Since validity of the state statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal under Section 237 (a) of the Judicial Code, 28 U. S. C. A., Sec. 344 (a)."

Therefore, appellees' motions should be denied.

Respectfully submitted,

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